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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 75

INTERNATIONAL HARVESTER COMPANY,
Appellant,

vs.

WILLIAM S. EVATT, TAX COMMISSIONER OF OHIO,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO.

APPELLANT'S BRIEF.

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APPELLANT'S BRIEF.

The case below is reported in 146 Ohio State 58; 64 N. E. (2d) 53.

Grounds on Which the Jurisdiction of this Court Is Invoked.

The jurisdiction of this Court is invoked on the ground that the judgment of the Supreme Court of Ohio appealed from sustained Ohio corporate franchise taxes against the Appellant which (1) deny the Appellant due process of law under the Fourteenth Amendment to the Federal Constitution, and (2) are taxes on transactions in interstate commerce in violation of the commerce clause of the Federal Constitution.

Concise Statement of the Case.

This appeal involves the validity of Ohio foreign corporation franchise taxes assessed against International Harvester Company, a New Jersey corporation, for the years 1937 to 1940 inclusive, based in the case of each year on the property held and business done by International Harvester Company in the preceding year.

The tax is imposed by Sections 5495 to 5499 inclusive of the General Code of Ohio, set forth in Appendix A hereto. Section 5495 provides for an annual fee or franchise tax levied on each foreign corporation "for the privilege of doing business in this State." The tax is based on a two-way apportionment of the value of the total issued and outstanding capital stock of the corporation determined as provided in Section 5498. That Section in effect imposes two franchise taxes separately arrived at. There is one tax on such proportion of one-half of the total capital stock value as is allocated to Ohio upon the ratio of Ohio property to total property, and there is a second franchise tax on such proportion of one-half the total capital stock value as is allocated to Ohio upon the ratio of business done in Ohio to total business done.

Section 5498 provides that after finding the total value of the issued and outstanding shares of stock of a foreign corporation, the Commissioner shall proceed as follows:

> "Divide into two equal parts the value as above determined of the issued and outstanding shares of stock of each corporation filing such report. Take one part and multiply by a fraction whose numerator is the fair value of all the corporation's property owned or used by it in Ohio, and whose denominator is the fair value of all its property wheresoever situated, in each case eliminating any item of good will; take the other part and multiply by a fraction whose numerator is the value of the business done by the cor-

poration in this state during the year preceding the date of the commencement of its current annual accounting period and whose denominator is the total value of its business during said year wherever transacted."

The combined amounts are subjected to an annual fee of 1/10th of 1% by Section 5499.

The Ohio franchise tax is not a tax in lieu of a property tax, but is an additional tax. The Ohio statute provides for the taxation of real estate and personal property, and Appellant's property in the state was, of course, subject to such general taxation (Section 5328, General Code of Ohio).

There is no dispute as to the total value of Appellant's outstanding and issued capital stock. There is no dispute as to the amount or value of Appellant's property in Ohio or the value of its total property, on the basis of which one of the two taxes imposed by the Ohio franchise tax Act is assessed. The sole question in dispute relates to the method employed by the Tax Commissioner in determining the other franchise tax based on an allocation and division of the Company's total annual business into (1) business done in Ohio, and (2) business done outside of Ohio.

International Harvester Company is a corporation of the State of New Jersey, with general business and accounting offices located in the City of Chicago, Illinois. It is engaged in the business of the manufacture and sale of agricultural implements and machines, tractors, motor trucks, binder twine and similar commodities and parts thereof (R. 56).

During the years 1936 to 1939 it operated four factories in Chicago as well as factories in Auburn, N. Y., Milwaukee, Wis., Chattanooga, Tenn., Canton, Rock Falls, Rock

Island and East Moline, Illinois, New Orleans, La., two factories in Springfield, Ohio, factories at Fort Wayne and Richmond, Indiana, and also for part of such period a factory at Indianapolis, Indiana, and a factory at Huntington Park, California (R. 56).

Appellant operated in the years 1936 to 1939 more than 100 selling branches in the United States, selling its products to dealers and users. The Ohio branches in 1936 to 1939 were located at Columbus, Cincinnati, Toledo and Cleveland (R. 57).

On sales in the United States, shipment of motor trucks from the Springfield plant was made on orders of the branches, partly by rail shipment from the factory to the branches or directly to the dealers, but chiefly by drive-away by independent contract carriers from the factory to the branch or to the dealer, or by the dealer taking delivery himself at the factory. In a very small proportion of cases, probably less than 1%, shipment was made from the factory directly to the consumer, or delivery was made at the factory to the consumer who drove his own truck away (R. 60). Except for a small amount of sales of miscellaneous castings and repair parts made by the factory, all sales of Appellant's products in the United States to dealers and consumers were made on orders solicited by representatives of the selling branch in whose territory the buyers were located, or on orders received by mail by the selling branch. All orders and contracts for the sale of goods were accepted by the Branch Manager of the branch in whose territory the buyers were located. The sale proceeds, cash and notes, for all products sold by a branch were received by the selling branch and principal and interest on the notes were collected by the branch making the sale (R. 59).

In the case of sales to subsidiary companies or to job-

bers in foreign countries, the shipping instructions to the factory were issued by the general office in Chicago (R. 59).

The function of the factory in all these sales, except the small amount of retail sales of castings and repair parts above referred to, is limited to the manufacture of the goods and their shipment as directed as above described (R. 59).

A. L. Vierling, Works Auditor of the Springfield Plant, testified that on the shipment of a motor truck to a dealer, on instructions received from the branch making the sale, the Springfield Plant made no sale invoice to the dealer but merely a property invoice describing the property shipped. He stated: "No dollars or cents are shown on the invoice. We are not interested in dollars and cents in the plant. We have nothing to do with dollars and cents in the plant" (R. 49). The witness also testified that no salesmen are employed or sent out by the Springfield Plant and that the Springfield Plant has no warehouse (R. 46-47).

The disputed amount of taxes involved in this appeal results from the inclusion in the numerator of the statutory "business done" fraction, as business done in Ohio, of gross receipts from sales of motor trucks assembled at the Appellant's factory in Springfield, Ohio, sold by Appellant's branches located outside of Ohio all over the United States on contracts solicited and accepted by said branches, and shipped direct from the factory at Springfield, Ohio, to purchasers located in states outside Ohio in the territory of such branches.

The Appellant had included in its tax returns, as business done in Ohio, all sales of its products, wherever manufactured, by its Ohio branches to Ohio customers. Thereby it included in business done in Ohio, all sales by the Ohio

branches where the sales were solicited or secured by the Ohio branches from Ohio customers for products made at Appellant's factories outside Ohio and shipped by the factory manufacturing them direct to the Ohio customers pursuant to the direction of the Ohio branch which made the sale and which kept all the records of the sale and collected the purchase price (R. 30, 69).

But the Ohio Tax Commissioner and the Ohio Board of Tax Appeals, in determining the assessments, *also* included, in business done in Ohio, sales where the situation was exactly reversed, that is, sales where nothing happened in Ohio except the manufacture or assembly of motor trucks at Appellant's plant in Springfield, Ohio, and the shipment of such trucks from the Springfield Plant direct to customers outside of Ohio (R. 71, 72, 74). The directions to make such shipments were sent to the Springfield Plant by the Company's branches outside Ohio, which had obtained and accepted the customers' orders, kept all the accounts, and received the sales proceeds.

This results in a treatment of sales made by branches outside Ohio to purchasers outside Ohio of goods manufactured in Ohio which is utterly inconsistent with the treatment of sales made by Ohio branches to Ohio purchasers of goods manufactured outside Ohio. The sale of a truck manufactured in Ohio is considered Ohio business where the sale was made by an outside branch to an outside buyer and the truck was shipped direct from the factory in Ohio to the buyer outside Ohio; and, inconsistently, the sale of an article manufactured in Indiana, for example, sold by an Ohio branch to an Ohio buyer and shipped direct from the Indiana factory to the Ohio buyer, is also considered as Ohio business.

The Ohio Tax Commissioner had included as business done in Ohio the sales of the entire output of the Spring-

field plant. Thirty-eight per cent (38%) in dollar volume of sales of all trucks shipped from the Springfield plant to points in the United States outside of Ohio, represented sales of motor trucks to buyers outside of Ohio, shipped on the instructions of the Company's branches outside of Ohio, which had obtained the orders and handled the transactions throughout (R. 20, 79; Ex. 5, R. 46, 53).

The Board of Tax Appeals modified the assessments of the Tax Commissioner by excluding from Ohio business sales of Springfield-manufactured motor trucks sold by branches of Appellant outside of Ohio to buyers outside Ohio and delivered to such buyers from the warehouse stocks maintained at such branches (R. 79). Such excluded sales amounted to 62% of the shipments of motor trucks from the Springfield plant to United States destinations. But the Board sustained so much of the Commissioner's assessments as resulted from including in "Ohio sales" or in Ohio "business done" sales of Springfield-manufactured motor trucks sold by branches *outside* of Ohio to customers *outside* Ohio and shipped direct from the Springfield plant to such buyers in states *outside* of Ohio. Such included sales amounted to said 38% of the shipments from the Springfield plant to points in the United States outside Ohio. This was done pursuant to Rule No. 275 of the Tax Commissioner, adopted October 13, 1939, which provides:

> "Rule No. 275. Business done in and out of Ohio—Business done in and out of Ohio by a corporation subject to the payment of franchise taxes shall be determined under Section 5498, General Code, by allocating to the business fraction therein provided sales in and out of Ohio.
>
> "All sales of goods from warehouses in Ohio, wherever manufactured, shall be considered as Ohio sales.
>
> "In the case of manufacturing companies, all sales of goods manufactured in Ohio, wherever sold, shall be considered as Ohio sales, except sales of such products as are sold from warehouses outside of this state.

"The denominator of such business fraction shall in all cases be the total sales wherever made." (R. 64).

Appellant appealed from the decision of the Board of Tax Appeals to the Supreme Court of Ohio, which affirmed the decision of the Board of Tax Appeals.

This appeal is limited to the franchise taxes for the years 1937 to 1940, inclusive. The increased amounts of additional franchise taxes under the modified assessments of the Tax Commissioner for those years, as approved by the Supreme Court of Ohio, resulting from the inconsistency in the interpretation of what is Ohio business and the inclusion of the 38% of outside-Ohio sales as "business done" in Ohio, are not minuscule. Taking the year 1939, for example, the amount of tax based solely on the factor of business done would be $21,132.67, which is an increase of $10,023.76 resulting from the inclusion of the 38% of sales made outside Ohio of Springfield-manufactured trucks, over the tax of $11,108.91 computed by omitting such 38% of sales. (See foot-note on pp. 20-21 for computations.) The annual tax owing upon the property factor, about which there is no dispute, is of course in addition to the tax upon the "business done" factor.

The 38% of such out-of-state sales are subject to franchise taxes in 9 states outside Ohio and to net income taxes in 32 states outside Ohio and the District of Columbia (R. 20-23) and also to sales and gross receipts taxes imposed by numerous states outside Ohio.

In this appeal the questions raised are whether the use of such 38% of sales made outside Ohio of Springfield-manufactured trucks as a measure of the Ohio franchise taxes assessed against Appellant denies Appellant due process of law under the Fourteenth Amendment to the Federal Constitution or is an imposition of tax upon transactions in interstate commerce in violation of the commerce clause of the Federal Constitution.

Specification of Assigned Errors Intended to be Urged.

Appellant urges the following errors, assigned in its Assignment of Errors (R. 2):

"1. The Supreme Court of the State of Ohio erred in including in business done in Ohio, in the computation of Appellant's Ohio Franchise Taxes for the years involved in this appeal, the proceeds received by Appellant from the sale of motor trucks when the orders or contracts were solicited and accepted by branches of International Harvester Company outside the State of Ohio, and when the trucks were shipped from the Springfield plant of International Harvester Company at Springfield, Ohio, which manufactured said trucks, on the direction of said branches direct to buyers in other states and in foreign countries, for the reason that the effect of the inclusion of said sales is to tax property and business of Appellant outside the State of Ohio, and therefore a denial of due process of law under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

"2. The Supreme Court of the State of Ohio erred in including in business done in Ohio, in the computation of Appellant's Ohio Franchise Taxes for the years involved in this appeal, the proceeds received by Appellant from the sale of motor trucks when the orders or contracts were solicited and accepted by branches of International Harvester Company outside the State of Ohio, and when the trucks were shipped from the Springfield plant of International Harvester Company at Springfield, Ohio, which manufactured said trucks, on the direction of said branches direct to the buyers in other states and in foreign countries, for the reason that the inclusion of such sales is to lay an unconstitutional burden on interstate commerce in violation of the Commerce Clause of the Constitution of the United States."

SUMMARY OF ARGUMENT.

The inclusion in the numerator of the "business done" fraction of the 38% of sales outside Ohio of Springfield-manufactured trucks not only taxes property and business of the Appellant outside the State of Ohio, in contravention of the due process clause of the Fourteenth Amendment, but also lays a multiple burden on transactions in interstate commerce, in violation of the Commerce Clause of the Federal Constitution.

Denial of Due Process.

From beginning to end all sales in this 38% category were handled by branches outside Ohio. The Springfield plant has no warehouse; and as soon as a truck is completed, it is shipped out. Essentially, therefore, sales in this 38% category partake no more of the nature of an Ohio sale than sales in which a branch outside Ohio delivers a truck to the buyer out of its warehouse stock. How can a sale handled from beginning to end by a branch outside Ohio be an "Ohio sale" or a sale made from an Ohio "warehouse" when Appellant has no warehouse at Springfield and all that the Springfield factory does is to ship the truck, when completed, direct to the out-of-state buyer at the direction of the outside branch?

Obviously sales in this 38% category are identical with the Class E sales which this Court held in *International Harvester Company* v. *Department of Treasury*, 322 U. S. 340, were subject to the Indiana gross income tax; that is, were subject to sales and gross receipts taxes by the state where the buyer and the selling branch are located. A

sale cannot be an Indiana sale subject to the Indiana gross income tax, and at the same time be Ohio "business done" under the Ohio franchise tax.

Sales in this 38% category not only may be subjected to gross receipts and sales taxes when made in any of the states which has such a tax but also are subject to state income taxes in thirty-two states and the District of Columbia and to corporate franchise taxes in nine states, when made in any state having an income or franchise tax. The very fact that each of these states treats the sales in this 38% category (which Ohio has held to be Ohio "business done") as sales in their respective taxing jurisdictions is striking proof that the capital stock value created by such sales has a situs outside Ohio, and that for Ohio to include them as Ohio "business done" is to tax extra-territorial values arising and situated outside of Ohio.

This taxing of extra-territorial values is accomplished in the instant case by an illogical and inconsistent use of the words "business done" as meaning, in the case of Ohio business, both *sales* by Ohio branches and Ohio *manufacturing activity*, and as meaning, in the case of business done everywhere, *merely* sales made everywhere. Either the fraction should be Ohio sales divided by total sales, or (if manufacturing activity is to be included) Ohio sales plus Ohio manufacturing activity divided by total sales plus total manufacturing activity. If the Ohio method of determining the numerator of the "business done" fraction is approved, every state in which Appellant manufactures can adopt it, with the inevitable result that the total of the numerators in the fractions will be substantially larger than the denominator—that is, the combined fractions will represent substantially *more* than all business done everywhere by Appellant.

Sales by Ohio branches of goods manufactured by Appel-

lant outside Ohio, and shipped by the factories outside Ohio, on direction of the Ohio branches, direct to the buyers in Ohio were included by the Tax Commissioner in the numerator of the "business done" fraction. This was proper, under *International Harvester Company* v. *Department of Treasury, supra.* But Ohio seeks to seize the business both ways, by including also sales of Springfield trucks when sold by branches outside Ohio and shipped by the Springfield plant direct to buyers in other states. This glaring inconsistency strikingly shows the arbitrary character of the Tax Commissioner's method in arriving at the numerator of the "business done" fraction.

The decisive opinion of this Court in the case of *Hans Rees' Sons, Inc.* v. *North Carolina,* 283 U. S. 123, holds that the use of an arbitrary allocation formula, which results in allocating an excessive net income to the taxing state, will not be permitted because the state is attempting to tax extra-territorial business and property. The same principle was applied to a tax on the entire capital stock value in *Cudahy Packing Co.* v. *Hinkle,* 278 U. S. 460, and in *Looney* v. *Crane Co.,* 245 U. S. 178. See also *Air-Way Electric Appliance Corp.* v. *Day,* 266 U. S. 71. The tax assessments in question are therefore invalid because they tax capital stock values arising and situated outside of Ohio, and hence deny due process of law under the Fourteenth Amendment.

Violation of the Commerce Clause.

The sales in the 38% category are either (1) sales in inter-state commerce or (2) extra-state sales. If they are extra-state sales, Ohio has no jurisdiction under the due process clause to use them as a measure of Ohio franchise tax value. If they are sales in interstate commerce, they cannot be used as a measure of Ohio franchise tax value

for the further reason that when so used, a multiple burden is laid on interstate commerce.

The Ohio franchise tax is really two taxes. One tax, which is laid on one-half the capital stock value in the ratio of Ohio property to total property, has nothing to do with the other tax, which is laid on one-half the capital stock value in the ratio of Ohio business to total business. The first tax is not here involved; the second is. An increase in "business done" in Ohio directly and necessarily results in an increase of the Ohio franchise tax. Accordingly, it inevitably follows that to include gross receipts in interstate commerce in the numerator of the "business done" fraction is to lay a forbidden burden on interstate commerce.

The conclusive reason why the inclusion of the 38% of sales as Ohio business lays a prohibited multiple burden on interstate commerce is found in the indisputable facts: (1) that these very same sales are subject to a gross income or sales tax, in every state which has such a tax, under the decision of this Court in *International Harvester Company v. Department of Treasury*, 322 U. S. 340 (Indiana, for example, is already imposing its gross income tax upon this class of sales which has been held by the Court below to be Ohio "business done") and (2) that such sales are subjected to franchise taxes in nine states and to net income taxes in thirty-two states and the District of Columbia (R. 20-23). Thus we have an *actual* (not merely a threatened) multiple burden on every one of the sales in this 38% category which is consummated by delivery of a product from the Springfield factory to a buyer in one of the taxing jurisdictions having one of such types of tax.

The Ohio franchise tax on "business done" is not a manufacturers' excise tax on the manufacturing activity as such, and therefore the case of *American Manufacturing*

Co. v. *St. Louis,* 250 U. S. 469, relied on by the Ohio Supreme Court in its opinion in the instant case, is not apposite. The Ohio tax is a tax on "the privilege of doing business" *as a foreign corporation* in Ohio in any form. If it were a manufacturers' excise tax on the manufacturing activity as such, it would have to apply to manufacturing activities whether conducted by a corporation, a firm or an individual, as did the tax in the *American Manufacturing Company* case. But this Ohio tax falls only on corporations, for the privilege of exercising their corporate functions within the state.

A manufacturers' excise tax, such as that in the *American Mfg. Co.* case, can be imposed but once, by the state of manufacture only, and there is no possibility of the multiple imposition of such a tax. A corporate franchise tax may be imposed in every state in which the corporation does business and may result in multiple burdens on interstate commerce which are not borne by intrastate commerce. The vice of the Ohio franchise tax is that it actually results in multiple taxation of interstate transactions.

The elements which constitute the manufacturing activity enter completely into the measure of the Ohio franchise tax. Under the property fraction (not here in dispute) Ohio measures a tax on one-half the capital stock value in the ratio of Ohio property to total property. The Springfield plant, land, machinery and equipment, within and by means of which the manufacturing activity is carried on, are necessarily a fair measure of the Ohio manufacturing activity.

The most cogent proof that Ohio is not attempting to reach the manufacturing activity as such is the exclusion, from the numerator of the "business done" fraction, of sales of Springfield trucks sold off the branch house floors in other states. The Ohio manufacturing activity obviously

is the same whether the truck is shipped direct from the Springfield plant to the buyer, or whether it is shipped first to the out-of-state branch and later sold off the branch warehouse floor. But the Board of Tax Appeals, with the approval of the Supreme Court of Ohio, has excluded sales off the branch warehouse floors.

Further, and equally conclusive of the soundness of our contention that the Ohio franchise tax is not a tax on the manufacturing activity as such, is the fact that goods not of Ohio manufacture *are included* in Ohio business when sold by Ohio branches to Ohio buyers, whether delivered off the Ohio branch house floors or shipped direct from the factories outside of Ohio to the Ohio buyers. There was of course no Ohio manufacturing activity in the case of such sales, yet they are included in the numerator of the "business done" fraction.

It is therefore impossible to say that Ohio is seeking to reach the manufacturing activity as such, and the tax cannot be sustained by such an argument. As construed and applied by the Ohio taxing authorities under Rule No. 275 and by the Ohio Supreme Court, the tax manifestly goes beyond the permissible bounds of exacting a fee for the privilege of doing business in Ohio and seeks to measure the fee by interstate transactions and thereby to levy a tax which constitutes a multiple burden on interstate transactions forbidden by the commerce clause.

ARGUMENT.

The Decision Below Denies Appellant Due Process of Law Under the Fourteenth Amendment.

In its decision in this cause, the Supreme Court of Ohio has upheld the inclusion, in the numerator of the "business done" fraction of the Ohio franchise tax formula, of sales made by selling branches outside Ohio of motor trucks produced at the Springfield plant of the Appellant, that is, sales where the orders or contracts were solicited and accepted by the selling branches outside of Ohio, and the trucks were shipped by the factory at Springfield on instructions of the selling branches in other states direct from the factory to the buyers in other states, and the branches outside of Ohio received the sales proceeds, and collected the notes given in payment when they became due.

These sales made outside Ohio were 38% of all shipments from the Springfield plant to points in the United States outside Ohio. Such 38% of sales was included as "Ohio sales" under the Ohio Tax Commissioner's Rule No. 275 which arbitrarily, and therefore unconstitutionally, provides:

> "In the case of manufacturing companies, all sales of goods manufactured in Ohio, wherever sold, shall be considered as Ohio sales, except sales of such products as are sold from warehouses outside of this state."

It is an anomaly to say that the 38% of sales made outside Ohio are "Ohio sales." The Springfield plant has no salesmen and has nothing to do with handling sales orders. When the Springfield plant ships a truck, it makes out a property invoice which it sends to the branch making

the sale, on which invoice no dollars or cents are shown. It was testified that the plant "is not interested in" and has "nothing to do with dollars and cents" (R. 49).

The factory at Springfield is merely a factory and a shipping point; indeed, it is largely an assembly plant (R. 60). The Springfield plant has no warehouse whatever. As soon as a truck is completed it is shipped out and must be shipped out, for there is no room for it at the plant (R. 47). Every essential step in the sale except the shipment of the truck is done outside of Ohio, and the shipment itself is made on the direction of the branch outside Ohio. The business is handled in exactly the same way whether delivery is made from the out-of-state branch warehouse or the branch instructs the factory to ship the truck direct to the buyer. In each case the outside branch accepts the order and receives the proceeds. In one case it delivers the truck from the branch house floor. In the other case, it directs the Springfield plant to ship the truck to the buyer. The Ohio Board of Tax Appeals and the Ohio Supreme Court both held that the sales completed by delivery from the branch warehouses outside Ohio were not "Ohio sales" or "business done" in Ohio. The same holding should have been made in respect to the out-of-state sales completed by shipment from the Springfield plant.

The sales in this 38% category are the same as the Class E sales which this Court held in *International Harvester Company, et al.* v. *Department of Treasury, et al.*, 322 U. S. 340, subject to the Indiana gross income tax. In that case the goods were manufactured outside Indiana and shipped direct to the buyer in Indiana on the direction of the branch in Indiana which accepted the sale contract. We submit that it is impossible for the same sale to be an Indiana sale under the Class E

category in the above case, and also an Ohio sale for the purposes of the Ohio franchise tax. Yet that is exactly what the Ohio Tax Commissioner's inclusion of these sales as Ohio sales comes to.

Rule 275 of the Ohio Tax Commissioner is squarely in conflict with the decision of this Court in the Indiana gross income tax case. The Rule states " • • • all sales of goods manufactured in Ohio wherever sold, shall be considered as Ohio sales • • •". This Court held in the Indiana case that the 38% of sales here involved were local sales in the state where the sales branch and the buyer are located. The Ohio Tax Commissioner and the Ohio courts say that the 38% of sales are Ohio sales.

If the 38% of sales are not Ohio sales but sales of the states where the branches and buyers are located, as this Court decided in the Indiana case, it would follow that the Ohio tax is measured by extra-territorial values and that there is a denial of due process of law under the Fourteenth Amendment.

The taxing of extra-territorial values is accomplished in the instant case by the illogical interpretation of the statutory words "business done" as meaning in the case of business done in Ohio *both* Ohio sales and Ohio manufacturing activity and as meaning in the case of total business done everywhere *only sales* everywhere. The same statutory words "business done" are given a double meaning as respects Ohio business, but only a single meaning as respects business everywhere. In order to satisfy the requirements of due process the concept of "business done" must be identical in the numerator and in the denominator the "business done" fraction. If both Ohio sales and Ohio-made goods are to be included in the numerator, then both sales everywhere and goods made everywhere should be included in the denominator.

However, since the formula adopted by the Ohio Tax Commissioner and by the Courts below uses sales everywhere as the *sole* element in the denominator, it follows that the numerator must necessarily consist *only* of sales in Ohio. The use of a "business done" fraction with such a correlated numerator and denominator would avoid measuring the tax by extra-territorial values and would be consistent with the requirements of due process under the decisions of this Court.

This question of constitutionality is brought into glaring focus by the utterly inconsistent position of the Ohio tax authorities and the courts below in using as the measure of the tax sales by Ohio branches of goods shipped from factories and warehouses outside Ohio direct to the buyers in Ohio, and yet at the same time, as brought out above, including sales by branches outside of Ohio of trucks produced at the Springfield plant, when the trucks were shipped direct from the Springfield factories to buyers in other states.

The undisputed evidence showed that in determining Ohio business no deduction had been made of sales by Ohio branches, where the goods were shipped from places of business of the Appellant outside Ohio direct to the buyers in Ohio (R. 20, 71-72).

We submit that there is no possible basis for defending the inconsistency in including in Ohio business the 38% of sales by branches outside of Ohio, where the trucks were shipped from the Ohio plant to out-of-state buyers, and at the same time including sales by Ohio branches where the goods were shipped to Ohio buyers from factories or warehouses of the Appellant outside of Ohio. To include both classes of sales in Ohio business must necessarily be to include one class of sales which does not constitute business done in Ohio, and therefore to tax property and business outside the jurisdiction of Ohio, and consequently

to deny due process of law under the Fourteenth Amendment.

We agree that sales by Ohio branches to Ohio buyers of goods manufactured outside of Ohio, which were shipped direct from factories or warehouses outside of Ohio to the buyers in Ohio, may properly be considered Ohio business. Appellant included such sales as Ohio business on its returns. But if such sales are Ohio business, then inescapably sales by branches outside Ohio of Springfield motor trucks shipped direct from the Springfield factory to buyers in other States are not Ohio business. *International Harvester Company, et al.* v. *Department of Treasury, et al., supra.*

The result of including the 38% of out-of-state sales in Ohio business is a distorted formula, which inevitably allocates to Ohio a disproportionate and arbitrary percentage of Appellant's capital stock value.

Although the amount of Ohio business done was materially reduced by the Ohio Board of Tax Appeals from the figure found by the Tax Commissioner by excluding the 62% of sales by branches outside of Ohio off their own warehouse floors, nevertheless there still remains in Ohio business, taking the year 1939 as an example, the amount of $11,578,844, representing the 38% of Springfield trucks sold by branches outside of Ohio which were delivered by shipment direct from the factory to buyers in other States (R. 37-39, Appellee's Ex. A, R. 28, 90).

If this 38% of sales outside Ohio is excluded from Ohio business, making the numerator $12,832,674, the resulting Ohio franchise tax on the "business done" fraction would be $11,108.91.[1]

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[1]Tax on Business Done Fraction by excluding the 38% of sales from "business done" in Ohio:

$12,832,674 (Ohio business done) divided by $213,001,465 (to-

If the 38% of sales outside Ohio is included as Ohio business, making the numerator $24,411,518.00, the resulting tax on the "business done" fraction would be $21,132.67.[2]

Thus the illegal method approved by the Supreme Court of Ohio practically doubles the tax on the "business done" fraction.

This Court held in its decisive opinion in the case of *Hans Rees' Sons, Inc.* v. *North Carolina*, 283 U. S. 123, that the North Carolina income tax on Hans Rees' Sons,

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tal business done) multiplied by $184,392,489 (one-half of capital stock value) multiplied by 1/10% equals $11,108.91 of tax.

$12,832,674 Ohio business is made up as follows:

$ 8,125,736	Ohio business per Appellant's original Franchise Tax Returns, consisting of sales of Ohio branches to Ohio buyers, plus Springfield manufactured castings and parts sold direct to customers (R. 69).
$ 4,706,938	Sales of Springfield trucks to subsidiaries. (Appellee's Ex. A, R. 28, 90).
$12,832,674	

[2]Tax on Business Done Fraction under decision of Supreme Court of Ohio, *i.e.* including the 38% of sales:

$24,411,518 (Ohio business) divided by $213,001,465 (total business done) multiplied by $184,392,489 (one-half of capital stock value) multiplied by 1/10% equals $21,132.67 of tax.

$24,411,518 Ohio business is made up as follows:

$ 8,125,736	Ohio business per Appellant's return (R. 69).
4,706,938	Sales of Springfield trucks to subsidiaries (R. 90).
11,578,844	Sales by branches outside Ohio of Springfield trucks shipped direct from the Springfield plant to dealers and users outside Ohio, *i. e.*, the 38% of sales.
$24,411,518	

The amount of $11,578,844 is arrived at by deducting $1,858,184 sales of Springfield trucks by Ohio branches (R. 69) from $32,328,826 total sales of Springfield trucks to dealers and users in the United States (Appellee's Exhibit A, R. 28, 90) and taking 38% of the balance of $30,470,642.

Inc., a New York corporation, denied due process of law under the Fourteenth Amendment because it allocated to North Carolina an excessive and arbitrary amount of the corporation's total net income. The total net income was allocated to North Carolina solely on the ratio of tangible property in North Carolina to total tangible property. This Court held that the North Carolina formula as applied to Hans Rees' Sons, Inc. was unreasonable and arbitrary in that it attributed to North Carolina a percentage of income "out of all appropriate proportion to the business transacted by the Appellant in that State." This Court said that where a corporation manufactured its goods in North Carolina and sold them in New York, the entire net income from the manufacture and sale of the goods could not under the federal due process clause "be taxed in one State regardless of the extent to which it may be derived from the conduct of the enterprise in another State" (p. 133).

In the Ohio franchise tax assessments involved in this appeal one tax on one-half of the entire capital stock value is measured solely by the percentage of business done in Ohio. Almost half of the total Ohio business used in the assessment consists of sales made outside of Ohio which are subject to sales and gross receipts taxes, and are actually used as the measure of income and franchise taxes, in many States outside of Ohio.

The use of an arbitrary allocation formula which results in attributing an excessive tax value to the taxing state, as in the *Hans Rees'* case and in this case, is invalid as an attempt by the State to tax extra-territorial values and a denial of due process of law, upon the same grounds that the attempt to tax the full value of the entire capital stock value of the foreign corporation was condemned in *Cudahy Packing Co.* v. *Hinkle*, 278 U. S. 460, and *Looney* v. *Crane Co.*, 245 U. S. 178, and upon the same grounds that the at-

tempt to fix an arbitrary value of $100.00 per share on no par capital stock actually worth only $7.00 per share (notwithstanding the application of a fair allocation formula to such arbitrary value) was condemned in *Air-way Electric Corporation v. Day*, 266 U. S. 71.

Unlike the Texas franchise tax upheld in *Ford Motor Co. v. Beauchamp*, 308 U. S. 331, which was measured solely by receipts from local intrastate sales to Texas buyers, Ohio here uses extra-state sales as a measure of the tax on one-half of the capital stock value. No decision of this Court to date has given validity to that basis of tax, and the Court has expressed the view that extra-state values may not be so utilized as to attribute an excessive proportion of the corporate stock or net worth or income to the taxing State.

The simple fact that this 38% of sales is subject to sales and gross receipts taxes in all states outside Ohio where the selling branches and buyers are located and is used as the measure of franchise taxes in 9 states outside Ohio and as the measure of net income taxes in 32 states outside Ohio and in the District of Columbia, is proof enough that these sales are not "Ohio sales" or Ohio "business done", but are "sales outside Ohio" and "business done" outside Ohio which should be excluded in computing the Ohio franchise tax.

If the Ohio method of determining the numerator of the "business done" fraction is approved, every state in which Appellant manufactures can adopt it, with the inevitable result that the total of the numerators in the fractions will be substantially larger than the denominator, that is, the combined fractions will represent substantially *more* than all business done everywhere by Appellant, and the total stock value taxed would be greatly in excess of the actual total value.

This is strikingly evident if we assume that a corporation did its business only in two states, *viz.*: Ohio, where all its manufacturing was done, and Indiana, where all its selling branches were located and all its selling operations carried on, and that each state had a tax identical with the Ohio "business done" tax.

If the factory in Ohio shipped the goods direct to the buyers in Indiana on sales made by the branches in Indiana, then on the "business done" fraction Ohio would tax the entire capital stock value based on "business done", since all the sales would be called Ohio business.

But Indiana would also tax the entire capital stock value based on business done, since Indiana would say that the sales were all made in Indiana, and were therefore Indiana business.

It follows that the capital stock value based on "business done" would be taxed fully twice.

Both in theory and in practice, therefore, the Ohio exaction arbitrarily taxes extra-territorial values and is a denial of due process of law.

The Decision Below Imposes a Burden on Interstate Commerce In Violation of the Commerce Clause of the Federal Constitution.

The assessments challenged in this appeal result from including in "Ohio sales" or Ohio "business done" the 38% of sales of motor trucks produced at Springfield, Ohio, sold by branches located outside Ohio all over the United States and shipped on instructions of those branches direct from Springfield to the buyers in States other than Ohio. These sales are either sales in interstate commerce, or they are extra-state sales.

If they are extra-state sales, we have demonstrated be-

yond question that Ohio has no jurisdiction to tax such sales or to use them as a measure of a tax, under the due process clause of the Fourteenth Amendment.

If they are interstate commerce sales, we submit that to use them as a measure is not only to deny due process but to lay a multiple burden on interstate commerce in violation of the Commerce Clause.

The Ohio franchise tax is really two taxes. There is one tax on one-half of the capital stock value based on the property fraction. It has nothing to do with the other tax, which is a tax on one-half of the capital stock value based on the "business done" fraction. As either fraction goes up or down, the tax under that fraction is separately and independently affected. Therefore, an increase in Ohio "business done" directly and necessarily results in an increase of the Ohio franchise tax. Accordingly, it follows ineluctably that to measure one of the two taxes by using in the numerator of the fraction gross receipts from sales made in interstate commerce is to lay a direct and immediate burden on interstate commerce.

It is true that in *Hump Hair Pin Co.* v. *Emmerson*, 258 U. S. 290, which was followed by *Western Cartridge Co.* v. *Emmerson*, 281 U. S. 511, the Illinois franchise tax was upheld when there was included in Illinois business sales by the taxpayers of goods manufactured in Illinois where the orders were accepted in Illinois and the goods were shipped from the Illinois factories direct to buyers in other States. In the Illinois tax, there was a unitary formula allocating a percentage of corporate value to Illinois by dividing the sum of Illinois business and property by the sum of total business and property. This Court said in the latter case that while the sales were in interstate commerce, they did not *directly* affect the taxes since, as the amount of property in Illinois might go down while the sales in

Illinois were increasing, the "exaction may rise while the sales to customers outside Illinois decline, and may fall while such sales increase." (p. 514.)

The decisions in those cases are clearly distinguishable because, in the first place, all of the important sales, manufacturing and business activities and all property of the taxpayers in the *Hump Hair Pin* and *Western Cartridge* cases were found in Illinois. In those cases the goods were made in Illinois, the contracts were accepted in Illinois, the offices handling the business were located in Illinois, and the proceeds were received in Illinois; the only activity outside of Illinois was the solicitation made by travelling salesmen; and no state except Illinois had any basis for imposing any kind of direct or indirect taxes on those taxpayers. That situation does not exist in the instant case.

Secondly, as the Ohio franchise tax is really two taxes, if the amount of Ohio business increases, the separate tax measured thereby increases. This Court said in the *Hump Hair Pin* and *Western Cartridge* cases that the effect of including interstate sales in the Illinois business was *remote* and *indefinite* and might not increase the tax at all. On the other hand, the effect of including the 38% of sales in question in Ohio "business done" is definite and immediate and almost doubles the tax. The property fraction does not affect the tax under the "business done" fraction, and the tax under the "business done" fraction does not affect the tax under the property fraction. Accordingly, we submit that under the very distinction made in the *Hump Hair Pin* and *Western Cartridge* cases, the inclusion of the 38% of sales as Ohio "business done" lays a *direct* and *immediate* burden on interstate commerce.

But the vital and compelling reason why the inclusion of the 38% of sales as Ohio business results in laying a prohibited multiple burden on interstate commerce is that the

very same sales are directly taxed or are used as the measure of a tax in many states where the Appellant has its branch houses.

The Supreme Court of Ohio states: "The record in this case discloses no instance of double taxation." (R. 119.) We think this is surprising, in view of the fact that the record shows that the Appellant does business in 9 states which have franchise taxes, and in 32 states and the District of Columbia which have income taxes, and that in every one of those states the Appellant makes its franchise and income tax returns, and reports as sales or gross receipts in the taxing state the sales made by the branches in that state, without excluding sales of goods manufactured outside of the state of the selling branch (R. 22, 23, 42). It is even more surprising in view of the decision of this Court in *International Harvester Company* v. *Department of Treasury, supra,* which upheld the imposition of sales and gross receipts taxes by a state in which both the sales branch and the buyer are located.

In 1939, for example, $11,578,844 of sales consisted of sales of motor trucks produced at the Springfield plant on contracts solicited, obtained and accepted by Appellant through its branches in other states with delivery of the trucks made by shipment from the Springfield plant direct to the buyers in other states. Accordingly, so much of the above sales of $11,578,844 as were sales made by branch houses in the 9 franchise tax states and in the 32 income tax states and the District of Columbia where the Appellant does business, were used as a measure not only under the contested Ohio franchise tax assessments, but were also used as the measure of franchise and income taxes in other taxing jurisdictions, and are liable for direct sales and gross receipts taxes in states outside Ohio imposing such direct taxes. A direct gross receipts tax on the Indi-

ana portion of such sales was upheld in *International Harvester Company* v. *Department of Treasury, supra,* thereby permitting all such sales to be subjected to direct sales and gross receipts taxes in states other than Ohio.

The Ohio Supreme Court was clearly in error in this case in its failure to recognize the development of the law made by this Court in *International Harvester Company* v. *Department of Treasury, supra,* a decision that overruled the Court's long-standing pronouncement made in *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506. The Ohio Court decided the instant case upon the authority of its prior decision handed down in 1942 in *Aluminum Company of America* v. *Evatt, Tax Commissioner,* 140 Ohio State 385, 45 N. E. (2nd) 118, in which it said:

> "If Ohio-manufactured goods are shipped to a warehouse in another state where the sale thereof would constitute doing business within such state, the Commissioner's rule eliminates the value of such goods from consideration. There is therefore no opportunity for double taxation, as *goods which do not come to rest before sale do not lose their character of interstate commerce in the state of delivery.*" (Italics supplied.)

But this Court in 1944 in *International Harvester Company, et al.* v. *Department of Treasury, et al., supra,* repudiated the theory that the sale of goods, coming into a state in fulfillment of a contract of sale made between a local seller and a local buyer, could not be taxed in such state of destination. That case held definitely that Indiana *could* tax sales of goods manufactured outside Indiana in a case where the selling branch and buyer were located in Indiana and the goods were shipped direct from a factory or warehouse outside of Indiana to the buyer in Indiana.

Therefore, contrary to the view expressed by the Court below, we have shown very positively that there is glaring multiple taxation resulting from the inclusion of the 38%

of sales as business done in Ohio. This multiple taxation arises not only under the Indiana gross income tax and similar taxes on sales and gross receipts in other states, but also under the franchise taxes of 9 states and the net income taxes of 32 states and the District of Columbia.

This Court said in *International Harvester Company, et al.* v. *Department of Treasury, et al., supra,* that "it will be time to cross that bridge when we come to it," namely, the bridge of double taxation. We respectfully submit that we have now come to the bridge of double—indeed, of multiple—taxation.

In its attempt to avoid the obvious conflict with the commerce clause, the Supreme Court of Ohio asserts Ohio's right to include the sales in question as Ohio business under the authority of the case of *American Mfg. Company* v. *St. Louis,* 250 U. S. 459, on the ground that it is the *manufacturing* activity of the Appellant in Ohio which is being taxed. The Supreme Court of Ohio declares that "the method followed by the Tax Commissioner and approved by the Board of Tax Appeals, in ascertaining the amount of business done in Ohio, which is all that is in question in the instant case, follows the procedure approved by the Supreme Court of the United States in the case of *American Mfg. Company* v. *City of St. Louis* * * *."

The tax in the St. Louis case is entirely different from the Ohio franchise tax. The St. Louis tax was not a *corporate* franchise tax on the privilege of conducting business in *corporate* form, but was a tax definitely and specifically laid on the privilege of manufacturing, whether done by a person, partnership, association or corporation. The Ohio tax is laid only on corporations and solely because they are corporations.

In the case of *J. D. Adams Mfg. Co.* v. *Storen,* 304 U. S. 307, this Court pointed out the vital distinctions between

the St. Louis tax and the Indiana gross income tax. The same distinctions apply to the Ohio franchise tax. This Court found that the St. Louis tax was definitely and specifically laid on manufacturing activity, whereas the Indiana gross income tax was "not a tax on the manufacture but a tax on gross sales", pointing out that the Indiana tax excluded from taxable gross income receipts from sales made at established business locations outside of Indiana. A similar exclusion is made under the Ohio franchise tax, which omits from Ohio "business done" sales completed by delivery from warehouses outside of Ohio. Therefore, it can no more be said in respect to the Ohio tax than it could be said in respect to the Indiana tax, that the tax is a manufacturers' excise tax.

The vital and controlling reasons, therefore, why the decision in the St. Louis case does not support the validity of the Ohio tax, are:

(1) The St. Louis tax, being specifically laid on manufacturing activity, was a tax which only the City of St. Louis (or the State of Missouri) could impose. No other city and no other state could validly impose an excise tax on such manufacturing activity.

(2) The Ohio tax is a corporate franchise tax which may be imposed by every state in which appellant foreign corporation does business, and in that respect is like a sales or gross income tax which every state which the transaction touches could seek to impose against the interstate seller.

Therefore, as respects the question of validity under the commerce clause, an excise tax on manufacturing is a tax which can be imposed but once and can never become any more of a burden on interstate commerce than it is a burden on intrastate commerce. A corporate franchise tax, however, may be imposed in many states and by repeated impositions may place double and multiple burdens on inter-

state commerce which intrastate commerce does not bear. The validity under the commerce clause of a corporate franchise tax is to be tested, therefore, upon the same principles which were applied to test the Indiana gross income tax, namely: May the tax result in the imposition of double or multiple burdens on interstate commerce?

The Supreme Court of Ohio states in its opinion that it is "committed to the proposition that the operation of a factory in Ohio constitutes business done in Ohio regardless of where the products of such factory are sold," and that it is also committed to the "proposition that the volume of sales might be used as indicative of the volume of the manufacturing carried on in such factories and as a proper element of comparison with the volume, similarly computed, of total business done by the corporation in and out of the state." (146 O. S. 70, 64 N. E. (2d) 58.)

Of course Appellant does not contend that manufacturing is not doing business. It does not contend that Ohio could not tax the manufacturing activity of the Appellant in Ohio. Appellant does contend that the Ohio franchise tax is *not* a manufacturers' excise tax, but is a franchise tax on the doing of business as a foreign corporation, and that as a corporate franchise tax its validity is to be tested.

Ohio itself admits in effect that its franchise tax is not a manufacturers' excise tax. It subjects to the tax goods *manufactured outside Ohio* and sold in Ohio. And it excludes from the tax all sales of Springfield trucks where the trucks were sold by Appellant's branches outside Ohio from their own warehouse floors. Ohio-manufactured goods are included in the measure of Ohio business *only* when the trucks are shipped from the Ohio factory direct to the buyers; they are not included when the trucks are sold by the branches and delivered from the branch warehouses. But the Ohio manufacturing activity is mani-

festly as great in one case as in the other. It is obvious, therefore, that it is not a manufacturers' excise tax which is being imposed.

The levy of the one tax on one-half of the capital stock value by the property fraction is already a fair measurement of manufacturing activity in Ohio. The use of a sales fraction is a direct measurement of sales activity. A payroll fraction could also be used to measure manufacturing activity. Or Ohio could employ a manufacturing fraction, that is, Ohio manufacture divided by total manufacture. But to take only a property fraction and a sales fraction, as Ohio does, and to use first a property fraction which fairly measures Ohio manufacturing activity and then to take a sales fraction and to distort it by loading the numerator with both Ohio sales and "Ohio manufacture", and including only total sales in the denominator, results in the instant case in the imposition of a prohibited multiple burden on interstate transactions, because the so-called "Ohio manufacture" with which the numerator is arbitrarily loaded consists of sales made in interstate commerce, which are already validly subject to direct sales and gross receipts taxes and to indirect franchise and income taxes in many other states.

If Ohio wishes to go further and tax the manufacturing activity as such with a specific excise, the way is open of course for its legislature to take steps to reach it. Ohio may impose a manufacturers' excise tax on Appellant in addition to the instant corporate franchise tax, or it may empower the City of Springfield to impose such additional manufacturers' excise tax. We contend only that since the Ohio tax is definitely and specifically a corporate franchise tax, it is not permissible to distort it into a manufacturers' excise tax and thereby to screen its vices from all surveillance under the commerce clause.

This court held in *McLeod* v. *J. E. Dilworth Co.*, 322

U. S. 327, that the fact that the taxing state (Arkansas) could levy a valid use tax on purchases made by buyers within the taxing state from an out-of-state seller and require such seller to collect the tax from the buyer, would not support the imposition of a sales tax against the seller when such sales tax offended both the due process clause and the commerce clause of the Federal Constitution. By the same token, in the case at bar the fact that Ohio could impose a valid tax on the privilege of manufacturing in Ohio will not support the instant corporate franchise tax which offends the same clauses of the Federal Constitution. Paraphrasing the language of this Court in the *Dilworth* case, which held *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, not apposite to that case, we can say here that the *American Manufacturing Co.* case "affords no ground for rejecting the deliberate choice of a state" to impose a corporate franchise tax measured by extra-territorial values and interstate transactions and thereby sustaining that tax as one on manufacturing activities..

Conclusion.

Therefore, the Ohio franchise tax, as interpreted by the Commission's Rule No. 275, and as applied by the courts below to Appellant in this case, offends not only the due process clause but also the commerce clause of the Federal Constitution; the decision below should be reversed; and the case should be remanded for the determination of the tax properly owing after the exclusion from Ohio "business done" of the 38% of extra-state and interstate sales.

Respectfully submitted,

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APPENDIX A.

General Code of Ohio.

Section 5495. Fee charged against domestic corporations and foreign corporations.—The tax provided by this act for domestic corporations shall be the fee charged against each corporation organized for profit under the laws of this state, except as provided herein, for the privilege of exercising its franchise during the calendar year in which such fee is payable and the tax provided by this act for foreign corporations shall be the fee charged against each corporation organized for profit under the laws of any state or country other than Ohio, except as provided herein, for the privilege of doing business in this state or owning or using a part or all of its capital or property in this state or for holding a certificate of compliance with the laws of this state authorizing it to do business in this state, during the calendar year in which such fee is payable.

Section 5495-1. When domestic corporations shall be considered organized; foreign corporations.—For the purposes of this act domestic corporations shall be considered organized upon the filing of articles of incorporation in the office of the secretary of state and foreign corporations shall be considered admitted to do business in Ohio when the statement for admission has been filed with the secretary of state or upon obtaining from such secretary a certificate of compliance with the laws of Ohio. Each domestic corporation shall be required to file its first report and pay the tax thereon in and for the calendar year immediately succeeding the date of its organization and each foreign corporation shall similarly re-

port and pay in and for the calendar year immediately succeeding its admission. Failure on the part of any foreign corporation for profit to proceed according to law to obtain from the secretary of state proper authority to do business or to own or use property in this state shall not excuse such corporation from liability to make proper excise or franchise tax report or return or to pay a proper excise or franchise tax or penalty, if such liability would have attached had such proper authority been obtained.

Section 5495-2. Annual report to tax commission; dissolution or withdrawal of corporation.—Within thirty days after the taking effect of this act and annually, thereafter, between the first day of January and the thirty-first day of March each corporation, incorporated under the laws of this state for profit, and each foreign corporation for profit, doing business in this state, or owning or using a part or all of its capital or property in this state, or having been authorized by the secretary of state to transact business in this state, shall make a report in writing to the tax commission in such form as the commission may prescribe. It shall be the duty of the commission to furnish corporations, on request, copies of the forms prescribed by it for the purpose of making such report. No domestic corporation may dissolve, nor may any foreign corporation withdraw or retire from business in Ohio, after January 1st in any year without having made a franchise tax report to the tax commission of Ohio, and having paid or secured the tax thereon, for the year in which such dissolution or withdrawal occurs.

Section 5496. Signatures on annual report.—The annual corporation report shall be signed and sworn to before an officer, authorized to administer oaths, by the president, vice-president, secretary, treasurer, general manager, superintendent, or managing agent in this state,

of such corporation. If a domestic corporation has not completed its organization, its annual report shall be signed and sworn to by one of its incorporators.

Section 5497. Contents of annual report.—The annual corporation reports shall include statements of the following facts as of the date of the beginning of the current annual accounting period of such corporation:

1. The name of the corporation;

2. The name of the state or country under the laws of which it is incorporated;

3. The location of its principal office and, in the case of a foreign corporation, the location of its principal place of business in this state and the name and address of the officer or agent of the corporation in charge of the business in this state;

4. The names of its president, secretary and treasurer, with the post office address of each;

5. The nature and kind of business in which such corporation is engaged;

6. The date of the beginning of the current annual accounting period of the corporation;

7. The amount of its capital, surplus, whether earned or unearned, undivided profits and reserves, as shown by the books of the corporation. A complete schedule shall be filed with the report showing the object and amount of each such reserve; also there shall be filed with said report a schedule of the annual rates of depreciation and depletion;

8. The location and value of the property owned or used by the corporation as shown on its books, both within and without the state, given separately; and the total amount of business done and the amount of business done within the state by said corporation during its preceding

annual accounting period, given separately. Business done within this state by domestic corporations shall include all business except extra-state business;

9. The value of the good will of the corporation as shown on its books if carried thereon as an asset.

Section 5498. Determining the value of the issued and outstanding shares of stock and intangible property; certification to auditor of state.—After the filing of the annual corporation report the tax commission, if it shall find such report to be correct, shall on or before the first Monday in May determine the value of the issued and outstanding shares of stock of every corporation required to file such report. Such determination shall be made as of the date shown by the report to have been the beginning of the then current annual accounting period of such corporation. For the purpose of this act, the value of the issued and outstanding shares of stock of any such corporation shall be deemed to be the total value, as shown by the books of the company of its capital, surplus, whether earned or unearned, undivided profits, and reserves, but exclusive of (a) proper and reasonable reserves for depreciation, and depletion as determined by the tax commission, (b) taxes due and payable during the year for which such report was made, (c) the item of good will as set up in the annual report of the corporation when said annual report is accompanied by certified balance sheet as showing such item of good will carried as an asset on the books of the company, (such balance sheet shall not be deemed a part of the public records, but shall be a confidential report for use of the commission only) and (d) such further amount as upon satisfactory proof furnished by the corporation, the tax commission may find to represent the amount, if any, by which the value of the assets (other than good will) of the corporation as carried on its books exceeds the fair value thereof. Claim for the de-

duction of such difference must be made by the corporation at the time of filing its report. The commission shall then determine as follows the base upon which the fee provided for in Section 5499 of the General Code shall be computed. Divide into t equal parts the value as above determined of the issued and outstanding shares of stock of each corporation filing such report. Take one part and multiply by a fraction whose numerator is the fair value of all the corporation's property owned or used by it in Ohio and whose denominator is the fair value of all its property wheresoever situated in each case eliminating any item of good will; take the other part and multiply by a fraction whose numerator is the value of the business done by the corporation in this state during the year preceding the date of the commencement of its current annual accounting period and whose denominator is the total value of its business during said year wherever transacted.

In determining the amount or value of intangible property, including capital investments, owned or used in this state by either a domestic or foreign corporation the commission shall be guided by the provisions of Section 5328-1 and 5328-2 of the General Code except that investments in the capital stock of subsidiary corporations at least fifty-one per centum of whose common stock is owned by the reporting corporation shall be allocated in and out of the state in accordance with the value of physical property in and out of the state representing such investments.

On the first Monday in June the tax commission shall certify to the auditor of state the amount determined by it through adding the two figures thus obtained for each corporation.

Section 5499. Charging fee for collection; payable to treasurer; failure to pay fee; penalty.—On or before June

15th the auditor of state shall charge for collection from each such corporation a fee of one-tenth of one per cent upon such value so certified and shall immediately certify the same to the treasurer of state, provided, however, that no fee shall be charged from any corporation which shall have been adjudicated a bankrupt, or for which a receiver shall have been appointed or which shall have made a general assignment for the benefit of creditors, except for the portion of the then current year during which the tax commission shall find such corporation had the power to exercise its corporate franchise unimpaired by such proceedings or act. But in no case shall the fee be less than twenty-five dollars.

Promptly upon receipt of the certificate of the auditor of state the treasurer of state shall mail to each corporation at its principal office in the state of Ohio, or to such person in the state of Ohio as the corporation may designate in its report, a statement showing the value or the proportionate value of the shares of stock upon which such fee is charged and the amount of the fee. Such fee shall be payable to the treasurer of state on or before the fifteenth day of the following July. If such fee is not paid on or before that time a penalty shall attach thereto as is provided in section 5491 of the General Code. But no penalty shall attach prior to the expiration of thirty days from the date of the mailing of the statement by the treasurer of state.